No. 84-2340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

J.W. FAIRMAN, Petitioner,

WARDEN, PONTIAC CORRECTIONAL CENTER,

-VS-

EUTUES WHITE, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED

I Whether there is any need for further clarification of this Court's clear holdings in Edwards v. Arizona and Miranda v. Arizona concerning the effect of a suspect's invocation of the right to consel during custodial interrogation.

II Whether this is a suitable case to consider the application of Stone v. Powell to Fifth and Sixth Amendment issues since Eutues White did not receive a full and fair hearing in the State Courts which misapplied the applicable law.

OPINIONS BELOW

On October 8, 1969, Eutues White was convicted of murder after a jury trial in the Circuit Court of St. Clair County, Illinois. He was sentenced to a prison term of 199 to 200 years. The prosecution's case linking White to the murder consisted of White's confession. At a suppression hearing held prior to trial, White challenged the admissibility of the confession. The trial court denied the motion.

On appeal, the Illinois Appellate Court ordered that a new suppression hearing be held to determine whether Miranda warnings were given prior to any questioning of White, and that White be re-sentenced. That opinion is reported as People v. White, 10 Ill. App. 3d 914, 295 N.E. 2d 300 (1973). On remand, Police Captain William Johnson, of the East St. Louis Police Department, stated four times that White said he "didn't want to talk about it; he would rather see a lawyer". The trial court again found the confession admissible, entered a new judgment of conviction, and imposed a sentence of not less than 66 nor more than 198 years. The Illinois Appellate Court, with one Judge dissenting, affirmed this judgment in an opinion reported as People v. White, 22 Ill. App. 3d 180, 317 N.E. 2d 323 (1974).

The Illinois Supreme Court also affirmed this decision in an opinion reported as People v. White, 61 Ill. 2d 288, 335 N.E. 2d 457 (1975). The Illinois Supreme Court found that there was a Miranda violation "which resulted from the failure of the police department to furnish White with a lawyer when he said he wanted to talk to one". 61 Ill. 2d 288, 296. Subsequently, White filed a petition for a writ of certiorari in the Supreme Court of the United States, docketed as No. 75-5901, which was denied on March 22, 1976. and is reported at 424 U.S. 970.

White then petitioned the United States District Court for the Southern District of Illinois for a writ of habeas corpus.

This petition was dismissed without an evidentiary hearing and the decision is unreported. On appeal, the United States Court of Appeals for the Seventh Circuit remanded for an evidentiary hearing to determine:

1) whether White actually requested counsel when he was in custody; 2) whether White subsequently waived the request for counsel; 3) whether the officers acted in good faith in obtaining the confession; and 4) whether the reasoning of Stone v. Powell[1] percludes federal habes corpus relief. This decision is reported as White v. Finkbeiner, 570 F.2d 194 (7th Cir., 1978)

An evidentiary hearing was held before the Honorable Robert D. Morgan, Chief Judge of the U.S.D.C. for the Southern District of Illinois. The District court concluded that White, while saying he would rather see an attorney than speak with the police, did not "unequivocally" invoke his right to counsel. The Court did not rule on the applicability of Stone v. Powell to Fifth and Sixth Amendment claims.

White's appeal to the Seventh Circuit resulted in that Court adopting the factual conclusion of the Illinois Supreme Court, that White had indeed requested an attorney. The Court however went on to concluded that during the following three days of interrogation White "waived" his rights[2].

Following the denial of a petition for rehearing, certitorari was sought and ultimately granted with this Court reversing the decision of the Seventh Circuit and remanding this cause for re-consideration in light of the decision in Edwards v. Arizona. 451 U.S. 1013 (1981)

In an a opinion which the Seventh Circuit identified as White III, the Court held:

> The facts of this case are almost identical to those of Edwards. In White II we found that, although not clear and unequivocal, White's statement during an initial interrogation: "I'd rather see an attorney," constituted a request for counsel under Miranda. 611 F.2d at 189-9-. Under Edwards, after requesting counsel during the initial interrogation, White should not have been subjected two days later to interrogation which he did not initiate and before which counsel had not been made available to him. Consequently.

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[1] Stone v. Powell, 428 U.S. 465 (1976).

[2] White v. Finkbeiner, 611 F.2d 186 (1979).

> when White confessed during the second interrogation he had not validly waived his Miranda rights. Nor did his confession itself constitute a valid waiver. Thus, White's confession was inadmissible. (Opinion p 4-5, footnotes omitted.)

The Court went on to conclude it did not have the authority to extend the holding in Stone v. Powell and that compelling reasons existed to conclude that the rationale of Stone v. Powell did not apply to violations of the Fifth and Sixth Amendments to the United States Constitituio.

JURISDICTION

The judgement of the United States Court of Appeals for the Seventh Circuit was entered on March 26, 1982. No rehearing was sought. Petitioner now invokes this Court's jurisdiction under 28 U.S.C. Sec. 11254 (1). Respondent originally invoked federal jurisdiction under 28 U.S.C. sec 2241

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person...shall be compelled in any criminal case to be a witness against himself ...

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

Amendment XIV

...nor shall any State deprive any person of life, liberty, or property, without due process of law.

VI

STATEMENT OF THE CASE

Eutues White, a nineteen year old youth, was arrested early in the morning on May 24, 1969. (Record of Suppression hearing--July 28, 1969, page 6; hereinafter, R. 6) No evidence was adduced as to why White was arrested. White testified though, at his federal court evidentiary hearing of February 20, 1979, that on May 24, 1969, he was walking down State Street in East St. Louis, Illinois, when he was accosted by two police officers who asked him for his name. (Evidentiary hearing of February 20, 1979, pages 10-11; hereinafter, S. 10-11) White denied that he was Eutues White but was then taken into custody and transported to the police station. (S. 10-11) He was placed in a cell where he remained from a half hour to an hour. He was then taken from the cell by an officer whom he did not know, to see Captain Johnson (S. 11)

Johnson asked if White knew him and if White would like to talk about why he had been arrested. White testified that his answer to Johnson was: "No. I was down here to see a lawyer". (S. 12) White was then returned to his cell. (S. 12)

William J. Stannis, of the East St. Louis Police Department, testified that he saw Eutues White on May 24, 1969, in connection with several armed robberies and homicides. He

hed not been notified that White had requested an attorney. (S. 36) At White's state trial, Stannis testified that he talked to Eutues White for several hours on May 24, 1969. (Trial transcript, page 64; hereinafter, T. 64) He spoke with White twice the next day--for at least two hours in the morning and for a few hours in the afternoon before 4 p.m. (T. 65) White seemed nervous. (T. 64)[1] On May 26th, Detective Stannis questioned White again before White signed the confession. (T. 65) White told Stannis that he used drugs. (T. 79)

Detective O'Sullivan, Stannis' partner, testified that he too, talked to White before he confessed on the morning of the 26th. (S. 11) The confession was typed up by Detective Stannis from the notes he had taken during the interrogation. (R. 7, 8) Detective O'Sullivan also testified that Eutues White was placed in a lineup and that he was palm-printed on May 25th, but that neither of these events pertained to the charge for which White was prosecuted. (R. 13) Finally, at 12:45 p.m. on May 26, 1969, Eutues White signed a statement confessing to murdering Bruce Reinheimer, a seventeen year old gas station attendant whom White allegedly robbed.

At his trial, Eutues White testified that he did not remember signing any confession. (T. 141) He denied ever participating in the robbery of Mr. Reinheimer (T. 141) and denied killing him. (T. 141) In fact, White did not recall being in jail at all in May of 1969. (T. 142)

White also testified that he was using drugs prior to his arrest. (T. 141) His doctor, Calvin Benton, testified at trial that when he saw White on April 9, 1969, it was discernable that White was on drugs. (T. 125) Dr. Benton saw White again on May 1, 1969, in the emergency room of Christian Welfare Hospital. (T. 125) He was call because White was having auditory and visual hallucinations. (T. 125) Dr. Benton recommended that White's aunt commit him to the

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[1] White later described his own condition at this time as "paranoid, hallucinating, you know, the shakes, nervous". (S. 13)

Alton State Hospital. (T. 126) Instead his aunt took him to her sister's. (T. 114)

In August, 1969 Eutues White underwent a psychiatric examination in the Belleville County Jail to determine whether he was capable of standing trial. (Competency hearing of September 12, 1969, page 8; hereinafter, C. 8) He was examined by Dr. Frank Perez, who was the Medical Director of The Belleville Mental Health Out Patient Center and Consultant to the Psychiatric Division of the Menard Prison. (T. 135) Dr. Perez showed Eutues White a signed confession to the Reinheimer murder along with signed confession to two other murders and an indictment for yet another murder. (C. 8) White stated:

> "I did not commit the crimes. I do not remember signing any papers. When I was picked up by Officers, Peytom and Huges I was under the influence of amphetamines. They say I did it. I remember only being held there. I told them I wanted a doctor. I had the idea that they wanted to kill me. They were torturing me. They were saying, 'We have evidence. We know people who said you did it.' Then they took me on a lineup, they said somebody identified me. Trickery. Then they ran out, typed statements, put in their words, then shoved the statements in front of me, I had no lawyer present. Maybe I signed." (C. 9)

Dr. Perez determined that Eutues White was competent to stand trial. He also found that White showed poor understanding, he lacked insight, and his I.Q. of 76 placed him in the range of borderline mental retardation. (C. 10) The possibility of minimal brain damage could not be ruled out. (C. 10)

REASONS FOR DENYING CERTIORARI

I. THERE IS NO NEED FOR FURTHER CLARIFICATION OF THIS COURT'S CLEAR HOLDINGS IN MIRANDA V. ARIZONA AND EDWARDS V. ARIZONA CONCERNING THE EFFECT OF A SUSPECT'S INVOCATION OF HIS RIGHT TO COUNSEL DURING A CUSTODIAN CUSTODIAL INTERROGATION

The thrust of petitioner's argument is that some confusion has resulted from this Court's recent decision in Edwards v. Arizona, 451 U.S. 477 (1981) Since the Edwards decision was nothing more than a re-statement of the clear guidelines set forth in Miranda v. Arizona, 384 U.S. 436 (1966) that if, following admonishments of his right to remain silent and his right to have counsel present during any interrogation, a suspect requests the assistance of counsel, "the interrogation must cease until an attorney is present." 384 U.S. at 474.

In essence the Edwards opinion holds that once a suspect requests counsel, further interrogation is barred, at least until the suspect has consulted with an attorney, or if he or she initiates further interrogation. There is nothing confusing about this holding, and petitioner's argument that confusion exists in the lower courts is simply not supportable.

The petitioner cites Johnson v. Virginia, 221, Va 736, 273 S.E. 2d 784 cert. dened 102 S.Ct. 422 (1981) as an example of the confusion existing. The opinion cited did not deal with any issue other than double jeopardy, and contains no discussion of Edwards. In an earlier appeal which resulted in a new trial being order, Johnson had raised an issue dealing with a statement obtained after he had, at arraignment, requested counsel. Justice Marshal writing in dissent of the denial of certiorari in Johnson, pointed that this ruling, which preceded the Edwards decision, violated the spirit if not the letter of that holding and stated that he would re-

mand the case for reconsideration in light of Edwards. 102 S.Ct. at 422. (1981) There is no reason to believe, that the courts of Virginia are confused by the Edwards opinion.

The State cites two cases from the First Circuit as examples of confusion alleging that in United States v. Kiendra, 663 F. 2d 349 (1981) the court used the totality of the circumstances test, while in United States v. Downing, 665 F2d 404 (1981) the court upheld the suppression of statements taken after a request for counsel was not honored and further interrogation was conducted at the initiation of the police. There is no conflict between these opinions, both of which were written by Chief Judge Coffin. The Kiendra case dealt not with a request for counsel but with the question of a knowing and intilligent waiver of the right to counsel and to remain silent. The Edwards opinion is referred to as a "recent reminder" of the proper standards in dealing with this issue 663 F.2d at 352.

In United States v. Downing, the Court upheld the suppression of statements taken after request for counsel was made and not honored. The Edwards decision is described as a clear restatement of the Miranda holding.

There is indeed some confusion in the case of Leuschner v. Maryland, 29 Md. App. 490, 443 A2d 1195 (1981) but this confusion stems from the facts of that case rather than any misunderstanding of the Edwards opinion. The Maryland court had no difficulty in understanding and applying the Edwards opinion to the facts before it. Indeed, the opinion starts with the declaration that the Edwards case outlined ended speculation that "time, change and the Supreme Court were eroding the Miranda v. Arizona rule" 433 A. 2d at 1196..

In short, rather than generating confusion, the Edwards case settled questions concerning the continued validity of the procedural requirements established in Miranda.

The basic reason for denying certiorari in this case, is that this Court has decided this case. As the Seventh

Circuit noted in it's opinion "The facts of this case are almost identical to those of Edwards." Opinion, p4.

There is no need to further clarify the explicit language of Miranda. There is no need to further litigate this issue. Eutues White's request for an attorney was ignored. The State of Illinois violated White's rights by introducing at trial a statement obtained after three days of interrogation following that request. The Seventh Circuit correctly applied the law to the facts of this case and the petition for certiorari should be denied forthwith.

II SINCE EUTUES WHITE NEVER HAD A FULL AND FAIR HEARING IN THE STATE COURTS, THIS WOULD NOT BE AN APPROPRIATE CASE TO CONSIDER EXTENDING THE HOLDING IN STONE V. POWELL TO CLAIMS RESTING ON THE FIFTH AND SIXTH AMENDMENT

Eutues White's case was reviewed by the Illinois Supreme Court. In its review that court concluded, based on the record before it, that prior to the start of the three day interrogation period which resulted in White's statement, he had invoked his right to remain silent and requested the assistance of counsel; People v. White 61 Ill. 2d 288, 335 N.E. 2d 457, at 461 (1975). At the time of this finding, the law was clear. A statement obtained from a suspect after a request for the assistance of counsel, was inadmissible against the defendant, Miranda v. Arizona, 384 U.S. 435 (1966)

Despite the settled state of the law, the Illinois Supreme Court affirmed the trial court's order denying White's pre-trial motion to suppress. When the State courts misapply the law the hearing provided can not be considered "full and fair."

Respondent urges that this case presents a suitable vechicle to litigate the extension of Stone v. Powell. 428 U.S. 465 (1976) The crucial factor in the Stone decision was that where the State courts have provided a full and fair hearing on Fourth Amendment issues, little or no reason exists for the further litigation of these issues in Federal

Court. There is, of course, no indication in Stone v. Powell that the holding would extend to bar federal litigation on violations of Fifth and Sixth amendment rights. Respondent beleives that the reasoning set forth by Judge Swygert in his opinion in the instant case as to why Stone v. Powell should not be extended are compelling. But petitioner's principle position, as stated above is that even the extension of Stone v. Powell would not change the result in this case since Eutues White never had a "full and fair" hearing in the State courts

White's initial appeal in the State court's resulted in a remand for a full and fair hearing. His first appeal in the Federal Courts also resulted in a remand for an evidentiory hearing. White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978) The highest courts to make factual findings following these hearings concluded that prior to being interrogated White invoked his rights to remain silent and requested the assistance of counsel. Based on these factual findings the only possible conclusion following a "full and fair hearing" would be that the statement was inadmissable. Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981)

Petitioner argues that statements in general, and specifically, the statement in this case, are reliable to the same extent as physical evidence siezed in violation of the Fourth Amendment. This argument is simply incorrect. The statement taken from White was typed by an interrogating officer who destroyed the notes on which it was based.

The statement alleged that white committed the crime in the company of a Carl Conners. The statement says that Conners and his sister live on Washington Place (T. 53.55) Yet the police were unable to find the Conners (T. 761) The confession refers to a .45 automatic, yet the testimony of the county coroner was that the murder weapon was "probably a .38 caliber". (T. 23) The statement is concluded with

a paragraph stating that the murder weapon was given to a Willie Griffin. The police knew where Griffin was. He was in the State prison at Menard. (T. 77) Yet the police produced neither the murder weapon nor Willie Griffin at White's trial.

White was 19 years old, a drug user, and in his own words "paranoid", at the time of his arrest..(R 13) A pre trial psychiatric examination set White's IQ at 76 clasifying him as being a borderline mental retard. (C-10) The statement was obtained after 3 days of interrogation, during which White had been palm-printed and placed in a lineup. (Rt 64-65, R 7-8, 131) The Illinois Supreme Court described the interrogation as being "unduly prolonged" People v. White, 61 Ill. 2d 288, 335 N.E. 2d 457 at 463 (1975) The statement obtained as a result, can not be accepted as being reliable, especially in light of the prosecution's failure to offer any real evidence to corroborate the "facts" in the statement. Nor is the violation of Eutues White's rights the "technicality" that the petitioner claims it to be. Indeed, on an early petition for writ of certiorari White argued that the statement was involuntary and thus inadmissable under the pre-Miranda case law. See Petition for writ of Certiorari, White v. Finkbeiner, # 79-6601

In conclusion, the opinion written by Justice Swygert outlines the reasons against the extension of Stone v. Powell; additionally the doctrine of Stone v. Powell should not apply to Eutues White since he did not have a full and fair hearing in the state courts, because the Supreme Court of Illinois failed to correctly apply the law.

CONCLUSION

For the foregoing reasons respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 81-2340

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-VS-

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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Eutues White, who is now held in the Illinois State Penitentiary, Pontiac Branch, asks leave to file his Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, without pre-payment of costs and to proceed in forma pauperis pursuant to the rules of this Court.

Respondent has been allowed to proceed in forma pauperis in all previous proceedings.

Respondent's affidavit in support of this motion is attached.

KENNETH L. JONES
Counsel for Respondent
Assistant Appellate Defender
Office of the State Appellate Defender
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Chicago, Illinois 60602
(312) 793-5472

SUBSCRIBED AND SWORN TO BEFORE ME
this 3rd day of September, 1982.

No. 81-2340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

J.W. Fairman, Petitioner,
Warden, Pontiac Correctional Center,

vs

Eutues White, Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Eutues White being first duly sworn on oath, deposes and says that I am the respondent in the above-entitled cause; that in support of my motion to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I have been granted leave to proceed as an indigent in all proceedings below. I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the matter are true:

1. Are you employed:

   a. If the answer is yes, state the amount of your salary of wages per month and give the name and adress of your employer.

   b. If the answer is no, state the date of your last

employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other forms of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalities for prejury.

EUTUES WHITE, Respondent

SUBSCRIBED AND SWORN TO BEFORE ME
this 27 day of August, 1982.

NOTARY PUBLIC